

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

PRESTON LEE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

December 13, 2002

No. 229920

Kalamazoo Circuit Court

LC No. 00-000071-FC

Before: Jansen, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of four counts of first-degree criminal sexual conduct (CSC-1), MCL 750.520b(1)(b), and one count of third-degree criminal sexual conduct (CSC-3), MCL 750.520d. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 25 to 40 years each for the CSC-1 convictions and 200 to 360 months for the CSC-3 conviction. Defendant appeals as of right. We affirm.

I

Defendant became romantically involved with the victim's mother, and began residing with the victim and her mother in May 1997. The victim was then fourteen years of age.

The victim testified at trial that shortly after defendant began living with them defendant came into her bedroom while her mother was at work, woke her and shared a couple of marijuana "cigars", referred to as "blunts", with her. He then left the room, returned a short time later, lay down next to the victim in bed, slid his hand inside her pajama bottoms and underwear and inserted a finger into her vagina. He then removed his finger, removed the victim's sleepwear, and performed cunnilingus on the victim. Defendant then engaged in sexual intercourse with the victim.

The victim further testified that, approximately two weeks later, while defendant and the victim were watching television in her mother's bedroom, defendant removed her clothing, ran his hands over her and then engaged in sexual intercourse with her.

Subsequent to these sexual contacts, defendant married the victim's mother. The couple separated in May 1999, after the victim's mother discovered defendant's marital infidelity.

Despite the separation, the victim and her mother celebrated defendant's June 1999 birthday with him. The victim testified that, following dinner and after the victim's mother left the residence, defendant and the victim smoked marijuana provided by defendant. They then went to her mother's bedroom and engaged in sexual intercourse.

The victim testified that sometime between August and October 1999 defendant came to her residence while her mother was at work. She and defendant smoked some "blunts" and drank alcoholic beverages, and then engaged in sexual intercourse in her bedroom. Afterwards, defendant wished the victim a belated happy seventeenth birthday.

Defendant denied any sexual contact with the victim. Defendant claimed that the victim fabricated the sexual abuse allegations to punish him for telling her that he no longer wished to consider her his daughter and for being unfaithful to her mother. Additionally, defendant challenged the credibility of the victim by highlighting the inconsistencies between her trial testimony and various out-of-court statements. In particular, defendant emphasized the fact that the victim initially told a police detective, a children's protective services specialist, and a physician that she was last sexually assaulted by defendant on her seventeenth birthday in August 1999, but modified her statement when she subsequently learned that defendant was incarcerated on her birthday.

The jury acquitted defendant of one count of CSC-3, but convicted him on the remaining charges.

II

Defendant first argues that the trial court abused its discretion and deprived defendant of a fair trial when the trial court refused to order the Department of Corrections transport officers to remove defendant's leg shackles, allowing the jury to observe him in these shackles. We disagree. Defendant did not timely raise this issue before the trial court. The issue was not raised on the record until after jury voir dire had been completed. Therefore, defendant must show that the claimed error was plain, i.e., clear or obvious, and affected defendant's substantial rights by prejudicing the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Here, the jury had already had the opportunity to see the leg shackles¹ before defense counsel requested for the record that they be removed. The trial court noted that prior to the trial, defense counsel raised the subject informally in the hallway near the judicial chambers, that the trial court had directed the corrections officers to remove either the belly chains which defendant had been transported in or the leg shackles, that defense counsel had indicated that if defendant had to choose which one of the two restraints was to be removed, the belly chain should be removed, and that defendant had made no previous formal request on the record that all of defendant's restraints be removed in the courtroom. The trial court also noted that defendant was wearing prison clothing, that it was obvious that defendant was in custody, and that defendant

¹ We are compelled to note that the record does not demonstrate with any certainty that any jurors actually did see the shackles.

had refused the opportunity to wear civilian clothing that had been offered to him prior to jury voir dire.

The trial court then asked one of the corrections officers why defendant was shackled. The officer told the trial court that absent an order from the trial court, Department of Corrections policy required corrections officers to keep defendant shackled. The officer also told the trial court that defendant was at a security level two which, although the meaning of this level was not precisely described for the record, appeared to be a higher security risk than security level one. In addition, the officer stated that the defendant's file revealed that sometime in the past he had attempted to flee from officers in a community setting. The trial court inquired of defense counsel why defendant was in prison, and learned that he had been convicted of felonious assault.

On the basis of this record, we do not find that it is more probable than not that the outcome of the proceedings was affected when the trial court denied defendant's request to remove the leg shackles. First, defendant wore the leg shackles throughout jury voir dire, and did not request their removal until after the jury had been selected. Assuming any jurors saw the shackles, any impressions these jurors had already drawn would not have been affected by removal of the leg shackles after they had already been seen. Second, it is well settled that a trial court has broad discretion in controlling the course of the trial, including the discretion to shackle a defendant during trial. *People v Banks*, 249 Mich App 247, 256; ___NW2d___ (2002). Where this issue has been properly preserved, we would review a decision to restrain a defendant for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). The totality of the circumstances here do not support the conclusion that the trial court abused its discretion in determining that some measure of shackling was warranted in light of the fact that defendant was serving a prison sentence for felonious assault and had a history of fleeing officers in the community. Defendant cannot establish prejudice if there was no abuse of discretion by the trial court.

Third, the defendant fails to establish that the *potential* that some jurors may have seen him with leg shackles was any more prejudicial to his right to be presumed innocent than the fact that defendant wore his prison uniform during voir dire and refused to wear the civilian clothes that had been offered to him, thus more obviously alerting the jury that he was in custody. For all of the above reasons, we find that defendant has not shown plain error warranting reversal of his conviction.

III

Defendant next argues that he was deprived of his right to the effective assistance of trial counsel. Defendant supplies a laundry list of eighteen alleged instances of constitutionally deficient representation in support of his ineffective assistance claim, but concedes that fourteen of these alleged deficiencies are not apparent on the already-existing record. In *People v Sabin* (on second remand), 242 Mich App 656, 658-659; 620 NW2d 19 (2000), this Court held that to preserve the issue of ineffective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary hearing, and that the failure

to move for new trial or for a *Ginther*² hearing ordinarily precludes review of the issue unless the appellate record contain sufficient detail to support the defendant's claim. Based on defendant's concession that the record is inadequate as to fourteen of his ineffective assistance of counsel claims, these claims of alleged deficiencies have been waived. *Sabin, supra*.

As for defendant's four remaining claims, defendant failed to request a new trial but did move in this Court to remand to the trial court for a *Ginther* hearing. However, defendant's motion to remand was untimely filed and this Court denied the motion. Accordingly, this Court's review of defendant's claims is limited to mistakes apparent on the appellate record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002), citing *Sabin, supra* at 659. If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue. *Id.*

To be successful on claims of ineffective assistance of counsel, defendant must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *Sabin, supra* at 659. Additionally, a defendant must overcome a strong presumption that the conduct complained of reflects sound trial strategy. *Id.*

Defendant argues that defense counsel was ineffective because he failed to timely object to defendant being in shackles in the presence of the jury. Even if we assume that counsel's performance was deficient, defendant cannot show that the outcome of the proceedings would have been different. As discussed earlier, the record does not show clear error in the trial court's decision to require that defendant wear leg shackles during the trial. In addition, defendant's own voluntary actions brought to the jury's attention the fact that he was in custody. Finally, the record does not demonstrate that any jurors *actually* saw the shackles. Accordingly, defendant has failed to demonstrate that counsel's performance was constitutionally deficient. *Sabin, supra*.

Defendant next argues that defense counsel was ineffective because he failed to present evidence demonstrating that a domestic violence charge brought against defendant and mentioned in passing by the victim's mother during her trial testimony was "without merit and false." Defendant has failed to rebut the presumption that defense counsel's decision not to draw the jury's attention to the otherwise innocuous reference to the prior charge constitutes sound trial strategy. *Sabin, supra*.

Defendant also argues that defense counsel was ineffective when he failed to object to the prosecutor's amending of the information to reflect a different date for one of the offenses. A trial court may permit the prosecutor to amend an information before, during or after trial unless the proposed amendment would unfairly surprise or prejudice the defendant. MCR 6.112(H). Defendant has not show that he was either unfairly surprised or prejudiced by the amendment. Under such circumstances, any objection by trial counsel would have been futile. Counsel is not

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Finally, defendant argues that defense counsel rendered ineffective assistance because he failed to thoroughly examine defendant in order to show the detail of his memory. Our review of the record reveals no deficiencies in trial counsel's examination of defendant.

For the above reasons, we reject defendant's claims that defense counsel was ineffective such that the outcome if the trial would have been different. *Sabin, supra*.

IV

Defendant also argues that the prosecution presented insufficient evidence at trial to support his convictions beyond a reasonable doubt. Specifically, defendant argues that the victim's trial testimony was so riddled with inconsistencies and so contradictory of prior statements made outside of court that her testimony was rendered completely devoid of credibility. When reviewing the sufficiency of the evidence presented at trial in a criminal case, we view the evidence in a light most favorable to the prosecution and determine whether a rational finder of fact could conclude that the essential elements of the offense were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). After review of the record, we conclude that the prosecution presented sufficient evidence to support defendant's convictions.

The testimony of the victim detailed six separate instances of sexual penetration. MCL 750.520b(1)(b); MCL 750.520d. It is a well-established rule that a jury may convict on the uncorroborated evidence of a CSC victim. *People v Lemmon*, 456 Mich 625, 642-643 n22; 576 NW2d 129 (1998), citing *People v Smith*, 149 Mich App 189, 195; 385 NW2d 654 (1986). Although the trial testimony of the victim differed from a series of out-of-court statements she made to various authority figures, defendant extensively cross-examined the victim with regard to these inconsistencies. The jury found the victim's testimony in large part credible, despite these inconsistencies. We must not invade the province of the jury and assess credibility anew when considering the proofs in a light most favorable to the prosecution. *Wolfe, supra* at 514-515; *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Accepting the jury's credibility determination, we find the evidence presented was sufficient to allow the jury to find, beyond a reasonable doubt, that defendant engaged in five acts of criminal sexual conduct involving penetration.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder